No. 85-1325

Supreme Court, U.S.
FILED
JAN 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHRISTINE GREEN,

Petitioner,

-vs-

OWENS-ILLINOIS COMPANY,

AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, AFL-CIO, LOCAL 700,

AMERICAN FLINT GLASS WORKERS UNION, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SIXTH CIRCUIT

John G. Rust
833 Security Building
Toledo, Ohio 43604
(419) 243-9191

Lewis W. Combest
833 Security Building
Toledo, Ohio 43604
(419) 243-9191

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Where a union member, discharged in 1974, pursuant to her union's direction, goes to Ohio Civil Rights Commission, then after the Unemployment Compensation Hearings has to go to the Toledo Bar Association to find an attorney; and attorneys representing unions and familiar with labor law will not take a case of this sort against another union; and this kind of a Section 301, and Section 1981, action involves complex and time-taking factual and legal issues; and Toledo Lawyers thought their actions were governed by Ohio Revised Code 2305.07 for liability based upon a statute, as the Court of Appeals had ruled as to a Section 1981 action in Mason v. Owens-Illinois, Inc., 517 F.2d 520(CA 6, 1975) and likewise on a Kentucky statute, Gray v. International Heat & Frost, 416 F. 2d 313, (CA 6 KY 1969), and on a Section

301 case in Ohio in 1982, Newton v. Local 801, Frigidaire,etc., 111 L.R.R.M. 2042 (CA 6, 1982); and the able and experienced Employer and Union Attorneys, first include the Statute of Limitations as a ground for Summary Judgment after United Parcel Service v. Mitchell, 451 U.S. 56 (1981), should Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) be applied prospectively, as the District Court so ruled herein?

2. Did Owens-Illinois have just cause for firing Plaintiff, and did the Unions unfairly represent Plaintiff, where the evidence showed Plaintiff, a Black, acted in self-defense, after she had left the Company gate, and was attacked on Buckeye Street, City's property, and the Local President, a white, out of conflict of interest, knowingly failed to argue in Plaintiff's

defense that 2 years earlier Owens-Illinois had ruled it had no jurisdiction over Buckeye Street fights, and that Owens-Illinois had not even investigated the fight in which the Union President was involved; and also the Union failed to argue that some whites involved in fights had not been fired, but blacks were always discharged; and where the Union failed to advise her of what Owens-Illinois claimed against her in the Grievance Meetings, and the Union failed to get Plaintiffs' side of the story; and where there was Racial hostility and jealousy against Plaintiff because she was advancing more than most whites, as an acting foreman, and acting Union Committee person; and the Union discouraged Union members from helping Plaintiff; and the Union failed to take her case to arbitration, although Owens-Illinois had no precedent for asserting

jurisdiction over the fight; and plaintiff had a good work record, not previously disciplined, and was complimented by her Union and Employer - two good reasons for expecting to win in arbitration?

3. On its Motion for Summary Judgment, was the employer Owens-Illinois chargeable under the doctrine of McDonald v. Santa Fe Trail Transportation, 429 U.S. 273, with intentionally discriminating against the Plaintiff, because Owens-Illinois applied harsher rules against blacks in various, but result-producing descisions and procedures, so that many whites who had committed acts of "comparable seriousness" were more favorably treated than blacks, including instances where O-I disclaimed jurisdiction over Buckeye Street to avoid having

to investigate whether the white Union President was the aggressor in a fight on Buckeye Street, and in failing to get the "story" or "side" of the black involved; but claimed jurisdiction when Plaintiff, a black, was involved in a fight with another black, and investigated both, requiring statements and fired both; in allowing whites to attend Grievance meetings, but excluding blacks; in contesting vigorously Unemployment Compensation for fighting, for blacks, but not for some whites; in practicing other subtle, but effective, means that favored whites over blacks; and, in addition, Owens-Illinois agents had uttered racial slurs; O-I appointed 4 blacks as foremen or assistant foremen, out of 204 - less than 2%, although blacks were 14% of the surrounding labor force; and blacks were placed in the less desirable and less paying jobs?

4. Does a Defendant in moving for Summary Judgment bear the burden of offering evidence to disprove each material allegation of the Plaintiff, which could establish liability, so that in so doing the Defendant is actually proving that on each material issue the evidence offered by Defendant shows that Plaintiff's case must fail on each material issue? And thus, if Defendant fails to disprove each material issue, the Defendant's Motion will be denied?

5. In passing on Motions for Summary Judgment by Defendants in a Section 301 Action, charging the Employer with no just cause for firing, and the Union with a failure to represent fairly, and in which also both the Employer, and the Union are charged with racial discrimination under Title 42, Section 1981, must, to avoid oversight, possible unintended error,

and to assure good judicial practice, in the District Court, the first instance, and the Court of Appeals, on appeal, set forth their findings on the evidentiary and/or factual contentions of the Plaintiff, and the Court's holdings of law?

LIST OF ALL PARTIES

The caption of this case contains the names of all the parties.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	
1.	1
2.	2
3.	4
4.	6
5.	6
LIST OF ALL PARTIES.	7
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.	vii
CITATION TO OPINIONS BELOW . .	7 A
STATEMENT OF JURISDICTIONAL GROUNDS	8
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	10
STATEMENT OF THE CASE. . . .	13
A. EVIDENCE SHOWING MRS. GREEN ACTED IN SELF-DEFENSE, AND O.I. HAD NO JURISDICTION BECAUSE FIGHT OCCURRED ON A CITY STREET, NOT O.I. PROPERTY.	14
B. EVIDENCE SHOWING A REPORTED BREAK-IN OF GREEN FAMILY HOME; MRS. GREEN DIRECTED TO CARRY A PISTOL; MRS. GREEN, IN ACCORD WITH O-I PRACTICE, REPORTS PISTOL TO O-I FOREMAN AND FOLLOWS O-I FOREMAN INSTRUCTIONS TO KEEP BULLETS OUT OF CHAMBER; AND THUS DOES NOT VIOLATE ANY O-I ORDER OR RULE; OTHER WOMEN FROM INNER CITY DID SAME THING.	18

C. DISCUSSION OF RECORD SHOWING SOURCE OF EVIDENCE FROM PARTS OF O-I PERSONNEL FILES, WHICH EVIDENCED DISPARATE AND RACIALLY DISCRIMINATORY TREATMENT BY O-I FAVORING WHITES. 20

D. O-I PERSONNEL RECORDS ON LARRY BALLARD SHOW, IN 1972, THAT O-I DID NOT HAVE JURISDICTION OVER FIGHT BETWEEN WHITE UNION PRESIDENT AND BALLARD, A BLACK, BECAUSE IT OCCURRED ON BUCKEYE STREET. 21

E. O-I ACTED DISPARATELY WHEN O-I DELIBERATELY FAILED TO INVESTIGATE A FIGHT ON BUCKEYE STREET BETWEEN A WHITE, MR. EDWARDS, AND A BLACK, BUT INVESTIGATED A FIGHT ON BUCKEYE STREET WHEN 3 BLACKS WERE INVOLVED; AND INVESTIGATED THE BLACKS TO SEE WHAT HAD HAPPENED INSIDE THE PLANT LEADING UP TO THE FIGHT, BUT DIDN'T SO INVESTIGATE THE WHITE-MR. EDWARDS FIGHT. 22

F. O-I AND UNION DISPARATELY TREATED MRS. GREEN, A UNION COMMITTEE PERSON, IN EXCLUDING HER FROM ALL GRIEVANCE MEETINGS ON HER DISCHARGE, BUT ALLOWED JACK OTTO, A WHITE, SO TO ATTEND. 24

G. IN THE ARBITRATION PROCEEDING FOR THE DAVID McDANIEL, JR.-EDWIN HUNTLEY FIGHT, O-I AGREED TO PROCEED IN THE ARBITRATION ON THE STATEMENTS 27

OF THE WITNESSES, WHICH O-I KNEW WOULD BE FAVORABLE TO ALLOWING THE WHITE, MR. McDANIEL TO BE RE-INSTATED. BECAUSE THE BLACK, MR. HUNTLEY ALREADY HAD A DIFFERENT JOB AND WAS NOT RETURNING TO O-I, WHEREAS IN DISCHARGES OF BLACKS, O-I ALWAYS INSISTED ON LIVE WITNESSES, AS FOR ONE FRANKLIN MOODY, A BLACK.

H. IN ONLY SUSPENDING FOR THIRTY DAYS LOCAL PRESIDENT EDWARDS FOR BRINGING A PISTOL ONTO THE PREMISES IN NOVEMBER, DECEMBER, 1980, EXACT DATE NOT BEING KNOWN, BUT DISCHARGING OAKLAND RIDLEY, A BLACK, FOR THE SAME OFFENSE, IN APRIL, 1974. 27

I. IN NOT CONTESTING THE UNEMPLOYMENT COMPENSATION BENEFITS OF WHITE, BUT CONTESTING THE CLAIMS OF BLACKS, IN DISCHARGES FOR FIGHT-AND RELATED OFFENSES, IN ORDER TO AID AND PREFER THE WHITES, ALTHOUGH THE CLAIMS OF THE DISCHARGED EMPLOYEES WERE SUBSTANTIALLY SIMILAR, AND PARTICULARLY IN CASES INVOLVING FIGHTING. 28

J. O-I, IN APPOINTING ONLY FOUR BLACKS TO HOLD EITHER FOREMAN OR ASSISTANT FOREMAN POSITIONS, OUT OF A TOTAL OF ROUGHLY 204, OR, A PERCENTAGE OF LESS THAN 2%; ALTHOUGH BLACKS HAD A MUCH HIGHER PERCENTAGE OF THE LABOR FORCE, AND OF THE SURROUNDING WORK COMMUNITY. 28

K. IN MAKING RACIAL SLURS AGAINST BLACKS. 29

L. IN PLACING A DISPROPORTIATE NUMBER OF BLACKS IN THE LESS DESIRABLE AND LESS PAYING JOBS, LIKE CARTON SEALING, WAREHOUSE AND SHIPPING. 30

M. THE UNIONS, FOR MATTERS REFERRED TO ABOVE, AND ALSO FOR REFUSING TO TAKE MRS. GREEN'S CASE TO ARBITRATION, RACIALLY DISCRIMINATED BECAUSE: 30

1. Mrs. Green had been acquitted of Assault and Battery, in Toledo Municipal Court

2. Mrs. Green's Case could be won because the attack on her took place on City property - Buckeye Street - therefore O-I did not have jurisdiction;

3. Mrs. Green had an excellent record, with O-I and the Union;

4. Mrs. Randleman could also have had her job back, on jurisdiction;

5. And both Mrs. Green and Mrs. Randleman could not each be found to be the agressor.

6. The Union had taken a white's case to arbitration. Mr. Otto, who admittedly was an agressor on company property and Mr. Otto had a bad work record.

N. ADDITIONAL EVIDENCE OF UNFAIR REPRESENTATION, AND DISPARATE TREATMENT BY UNION. 31

O. NEITHER MRS. GREEN NOR HER COUNSEL NOR LAWYERS GENERALLY EXPECTED THAT THIS COURT WOULD DECLARE A 180-DAY STATUTE OF LIMITATIONS. 33

BASIS FOR FEDERAL JURISDICTION . . 34

ARGUMENT 35

I. DEL COSTELLO V. INTERNATIONAL BROTHERHOOD OF TEAMSTERS SHOULD BE APPLIED PROSPECTIVELY IN OHIO; BECAUSE IT DID REPRESENT A CLEAR BREAK WITH CASES APPLICABLE TO OHIO LITIGANTS; AND IT'S SIMPLY UNFAIR AND UNJUST TO HAVE EXPECTED MRS. GREEN, AND ANY COUNSEL SHE COULD OBTAIN, TO HAVE KNOWN SHE MUST BRING HER SECTION 301 ACTION IN 180 DAYS. 35

II. BOTH BENCH AND BAR, AND ABOVE ALL, THE MERICAN CITIZENS AND PERSONS INVOLVED, NEED DIRECTION FOR THIS COURT AS TO WHAT DOES, AND DOES NOT, CONSTITUTE A PRIMA FACIE CASE UNDER TITLE 42, SECTION 1981, WHICH DEPENDS PRIMARILY ON DISPARATE TREATMENT, WITH SUPPORTING STATISTICAL EVIDENCE. 35

III. BENCH AND BAR NEED DIRECTION AS TO THE OBLIGATIONS OF THE MOVING 42

PARTY IN A MOTION FOR SUMMARY JUDGMENT TO OFFER EVIDENCE DISPROVING EACH MATERIAL ALLEGATION OF THE PARTY MOVED AGAINST.

IV. THE UNION UNFAIRLY REPRESENTED MRS. GREEN 44

V. EVERY COURT IN DISPOSING OF A CASE, SHOULD STATE THE MAIN CONTENTIONS, FACTUAL AND LEGAL, OF A PARTY, AND DEMONSTRATE THEIR INVALIDITY, BOTH FACTUALLY AND LEGALLY. 44

CONCLUSION 46

TABLE OF AUTHORITIES

	Page
Anchor v. Hines 424 U.S. 454	44
Del Costello v. International Brotherhood of Teamsters 462 U.S. 151 (1983)	2.35
Fong v. American Airlines, Inc. 626 F.2d 759, (CA 9, 1980)	41
Gray v. International Heat and Frost 416 F.2d. 313, (CA 6 Ky. 1969)	1
Grigsby v. North Medical Center Inc. 586 F.2d 457 (1978)	41
Mason v. Owens-Illinois, Inc. 517 F.2d 520 (CA 6, 1975)	1
McDonald v. Santa Fe Trail Transportation Co., 429 U.S. 273 (1976)	4,36
Milstead v. International Brotherhood of Teamsters, Local Union No. 957 580 F.2d 232 (CA, 6, 1978)	41
Newton v. Local 801, Frigidaire, Etc. III L.R.R.M. 2042, (CA 6, 1982)	2
Rayburn v. J.C. Penney Outlet Store 3 Ohio App. 3d 463 (1982)	42
Smith v. General Motors Corp. 747 F.2d 372, (CA 6, 1984)	4

United Parcel Service v. Mitchell 2
451 U.S. 56, (1981)

Williams v. DeKalb 41
82 F.R.D. 10, (1979);
577 F.2d 248; 582 F.2d 2

Windsor v. Bethesda General 41
Hospital
523 F.2d 891, (CA 8, 1975

CONSTITUTIONAL
AND STATUTORY PROVISIONS

U.S. CONSTITUTION

Amendment XIII 10

Amendment XIV 10

UNITED STATES STATUTES

Title 42, Sect. 1981 App. P. 24

Title 29, Section 185 App. P. 24

OHIO STATUTES

Ohio Revised Code:
Section 2305.07 12
Laws of Ohio, Volume 125,
Page 176

CITATIONS TO OPINIONS BELOW

The United States Court of Appeals, Sixth Circuit, issued its Opinon and Order, App. P. 1 on October 17, 1985, affirming in all respects the Judgment, App. P. 8, and the Opinion and Order, App. P. 9 of the United States District Court, Northern Divsion of Ohio, Western Division on January 5, 1984. A Notice of Appeal was timely filed on February 6, 1984.

STATEMENT OF JURISDICTIONAL GROUNDS

Petitioner seeks review by this Court of the Judgment, entered on October 17, 1985, by the United States Court of Appeals, Sixth Circuit, App. P. 1, which affirmed a Judgment of the U.S. District Court, for the Northern District of Ohio. App. P. 8.

Jurisdiction is conferred on this Court to review by writ of certioari the Judgment and Order of the Court of Appeals by 28 U.S.C.A. Par. 1254. Jurisdiction is conferred on the Court of Appeals to review the judgment of the District Court by 28 U.S.C.A. Par. 1294.

Petitioner in the U. S. District Court sued for wrongful discharge by the Owens-Illinois Company, and Unfair Representation by the Unions, and charged each with intentional Racial Discrimination. Jurisdiction in the District Court is, and was, claimed under 28 U.S.C. 1331,

1337, and 1343; 29 U.S.C. Paragraph 151, 185, and Section 301; and under Title 42, Section 1981, of the Civil Rights Act of 1866, 1870, and 1871.

In the Court of Appeals there was no order explicitly extending the time for filing a Petition for a Writ of Certiorari. However, on October 31, 1985, the Court of Appeals granted Petitioner's Motion for an Extension to November 14, 1985, within which to file her Petition for Rehearing. Petitioner then mailed her Petition for Re-hearing on November 13. 1985, which customarily would have been sufficient time for it to be received and filed on time on November 14, 1985, but for some reason, it was not received on time. Petitioner then filed her Motion for Leave to File Instanter her Petition for Re-hearing En Banc, and the

Court of Appeals granted the Motion, and allowed the filing of the Petition for a Re-hearing on November 21, 1985. The Court of Appeals then denied the Petition for a Re-hearing on January 2, 1986, App. P. 6.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

UNITED STATES CONSTITUTION. AMENDMENT XIII.

Section 1:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

> Congress shall have power to enforce this article by appropriate legislation.

UNITED STATES CONSTITUTION, AMENDMENT XIV.

Section 1:

> All persons born or naturalized in the United States, and subject

to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Also involved are Title 42, Section 1981, App. P. 24; and Title 29, Section 185, App. P. 24.

Petitioner claims her action is governed as to the Statute of Limitations for actions based on violations of Statutory Duty by Ohio Revised Code 2305.07, which provides:

LAWS OF OHIO, Volume 125, at Page 176.

Section 2305.07:

> "Except as provided in Section 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."
>
> (Emphasis ours)

STATEMENT OF THE CASE

This is an Action wherein Plaintiff Christine Green sued her employer and her Local and International Unions, charging in her so-called Section 301 action that her employer did not have "just cause" to discharge her on April 24, 1974, and her Union with having failed to represent her fairly in the Grievance Procedures; and in her second cause of Action, Mrs. Green sought relief and damages under Title 42, Section 1981, for racial discrimination by each defendant. The District Court granted Summary Judgment for all Defendants on the Section 301 action, under the Statute of Limitations, and on the Racial Discrimination Section 1981 action on the ground the Employer had just cause to fire Mrs. Green. The Court of Appeals affirmed.

Owens-Illinois Co., herein after re-

ferred to as O.I., on April 24, 1974 discharged Mrs. Green for

1. Violating the Company Rule against fighting on Company property;

2. Carrying a concealed weapon inside company premises (No. O.I. Rule prohibiting same);

3. Throwing a fingernail sized pebble at her assailant, safely inside a car with windows up, on O.I. parking lot.

Mrs. Green denies, and denied, all violations.

A. EVIDENCE SHOWING MRS. GREEN ACTED IN SELF-DEFENSE, AND O.I. HAD NO JURISDICTION BECAUSE FIGHT OCCURRED ON A CITY STREET, NOT O.I. PROPERTY.

After the Third or "Graveyard Shift", Mrs. Green, accompanied by her daughter, Claudia, a friend named Mrs. Loretta Rios, and a Mr. Terrance Tillman, walked out together.

In Mrs. Green's Affidavit, filed February 13, 1981, she under oath stated

in paragraph 7, in part, these statements:

> "Mrs. Green does not now remember who was to her right nor to her left. They walked past the gate, past the Security Guard House, past the line of the sidewalk, which runs parallel to Buckeye Street, and along the southerly side of the street and had passed the area between the sidewalk and the edge of the macadam or asphalt or blacktop pavement of Buckeye Street; and Mrs. Green had walked onto Buckeye Street or two or three feet, when she was attacked by Paulette Randleman. Before Paulette Randleman got close to Mrs. Green, Paulette Randleman yelled out words to the effect, "Bitch, I'm going to whip your ass right now." Mrs. Green was then fearful, did not think that she could run away and be safe, and her instinctive thought was to get out of her hands the object she was carrying. In her left hand she had two brown paper sacks, pans and food where they had held a birthday party supper on the shift for Mrs. Terrance Tillman. In her right hand she had a white paper bag, pretty well filled with Avon products, and over her right shoulder was her shoulder bag purse, large. When Mrs. Green saw Paulette coming at her with Paulette's right hand holding an open knife and her right hand drawn back, Mrs. Green instinctively felt that her only defense was to get -

rid of her bags, and in doing so, to the best of her recollection, she turned some to her right, got rid of everything, and then came back at Paulette, and threw a right-hand punch, which hit Paulette on her left cheek bone, and this knocked the knife out of Paulette's right hand."

And also in Paragraph 7:

"Mrs. Green recalls that the knife looked big, and she thinks that the blade was six or eight inches extending beyond the handle or handgrip. Also, when Mrs. Green had seen Paulette coming at her, she could see standing hearby three men who Mrs. Green knew were very socially and intimately associated with Mrs. Paulette Randleman, and Mrs. Green knew right then that those three men were going to be on Paulette's side, and that she had to deal with them; and this also is a part of the reason of why she had no alternative but to stand there and to defend herself by fighting as best she could."

Mrs. Green did not at any time use a knife and stated in Paragraph 7 of her Affidavit:

"If Mrs. Green had intended to really hurt Paulette or to injure her, Mrs.

> Green could have grabbed the knife herself, and used it to attack Paulette. Mrs. Green was simply trying to defend herself. The men then got ahold of Mrs. Green, pulled her away from Paulette, and then held Mrs. Green on the ground, where Paulette could come at her. During this time, someone other than Paulette Randleman kicked Mrs. Green in the mouth. While Mrs. Green was being held or pinned on the ground by these three above-named men, Paulette did try to use a knife on Mrs. Green. Mrs. Green, at no time, used a knife or had a knife on her. To Mrs. Green's knowledge, her daughter Claudia did not have a knife, nor put her hands on a knife, during this entire affair."

All of the fight occurred on Buckeye Street; as Mrs. Green stated also in Paragraph 7 of her Affidavit:

And further on self-defense, in Paragraph 7 of the Affidavit:

> "All of the action which had been described up to now, took place <u>on</u> Buckeye Street, on the blacktop <u>or</u> macadam or asphalt type of pavement, and on the street itself, and not on the apron, nor the driveway, nor the approaches to the street. Paulette, from time to time, went at Mrs. Green with the knife, but Mrs. Green did use her

feet and bend herself as best she could, although she was cut by a knife on her left side of her face, under the left eye. In the struggle itself, instinctively, Mrs. Green grabbed Paulette's hair in trying to defend herself, and in trying to prevent Paulette from using a knife on Mrs. Green. Mrs. Green wears glasses, and right at the very start her glasses had been knocked off, and this left her feeling also defenseless, because she is nearsighted."

B. EVIDENCE SHOWING A REPORTED BREAK-IN OF GREEN FAMILY HOME; MRS. GREEN DIRECTED TO CARRY A PISTOL; MRS. GREEN, IN ACCORD WITH O-I PRACTICE, REPORTS PISTOL TO O-I FOREMAN AND FOLLOWS O-I FOREMAN INSTRUCTIONS TO KEEP BULLETS OUT OF CHAMBER; AND THUS, DOES NOT VIOLATE ANY O-I ORDER OR RULE; OTHER WOMEN FROM INNER CITY DID SAME THING.

"During the night when Mrs. Green was working the Graveyard shift, Mrs. Green received an emergency call to come to her home, because it was reported that the house was being burglarized while the Green's minor children were there. See Mrs. Green's Affidavit, filed February 13, 1981, Supra. Mrs. Green went home, and there was told by her husband, Mr. Fred Green, in

> front of Toledo Police, that since he was not sure whether he would have to work late, and therefore she might be coming home alone, that she should carry a .22 calibre pistol which he then gave her. She put it in her purse, took it with her back to Owens-Illinois, reported it as per Company instructions to her Foreman, Mr. Harry Sams, who told her to keep the bullets out of the chamber, and to keep it in her purse which she did. Mrs. Green was within the O-I practice and instructions in so doing. O-I's written rules did not mention any ban on carrying weapons."
>
> P.4. Petition For Rehearing En Banc.

Other females carried small pistols, because of dangers faced when returning to their homes in the Inner City.

In April, 1974, the month in which Mrs. Green was suspended and fired, O-I and the Union processed a grievance for one Givens, wherein O-I stated that any employee bringing a gun into the plant should report it to the O-I foreman. Mrs. Green did that, and complied with O-I's policies and practices. There

was no Company rule banning carrying a pistol into the plant.

C. DISCUSSION OF RECORD SHOWING SOURCE OF EVIDENCE FROM PARTS OF O-I PERSONNEL FILES, WHICH EVIDENCED DISPARATE AND RACIALLY DISCRIMINATORY TREATMENT BY O-I FAVORING WHITES.

During discovery; pursuant to Rule 34, Plaintiff was allowed to see certain O-I personnel files of certain disciplined employees. Copies were made and marked "secret," per an order by the District Court. This authenticated that the papers were O-I papers. On February 18, 1981, Plaintiff filed with the clerk, as per the Pre-Trial Order, selected parts of different personnel files, and other exhibits, as Plaintiff's Exhibits to be used at the

then scheduled trial. Copies were served on opposing counsel. Various of the parts of O-I personnel files had been used before and attached to memoranda or Motions, etc. These Exhibits were sent to the Court of Appeals.

D. O-I PERSONNEL RECORDS ON LARRY BALLARD SHOW, IN 1972, THAT O-I AND UNION PRESIDENT EDWARDS, RECOGNIZED THAT O-I DID NOT HAVE JURISDICTION OVER FIGHT BETWEEN WHITE UNION PRESIDENT AND BALLARD, A BLACK, BECAUSE IT OCCURRED ON BUCKEYE STREET.

One year and seven months before Mrs. Green was fired for a fight on Buckeye Street - outside the plant - the O-I personnel records for Larry Ballard show the following entry by O-I Foreman Dave Maine:

> "9-29-72. Upon leaving work at 2:30 p.m., on this date, employee stated to B. Edwards & myself,

'Which one of you son of a bitches is coming outside, I'm going to kick the shit out of one of you!' I told him to hold his tongue, talk of this nature would not be tolerated. Before leaving he & B. Edwards had words in the main aisle of Heat Treat where employee allegedly pulled his belt off. Before I got over to see what was going on, Employee was on his way out & Edwards had returned to work. 9-29-72. Edwards called me at home on evening of 9/28 & told me he and this employee had had a fight in the middle of Buckeye Street. He stated that after exchanging punches for a short period of time this Employee hit him in the forehead with a belt buckle. After checking with personnel & finding out the guard reported the fight was in the middle of Buckeye Street. I asked Edwards if he was going to press charges against this employee; he stated no & wished the matter dropped. Because we do not have jurisdiction on city property the matter was dropped.
9-29-72. Employee was terminated for insubordination & threatening myself & Rod Fadden this date at the end of shift." (Underscoring ours)

E. O-I ACTED DISPARATELY WHEN O-I DELIBERATELY FAILED TO INVESTIGATE A FIGHT ON BUCKEYE STREET BETWEEN A WHITE, MR. EDWARDS, AND A BLACK, BUT INVESTIGATED A

FIGHT ON BUCKEYE STREET WHEN 3 BLACKS WERE INVOLVED; AND INVESTIGATED THE BLACKS TO SEE WHAT HAD HAPPENED INSIDE THE PLANT LEADING UP TO THE FIGHT, BUT DIDN'T SO INVESTIGATE THE WHITE - MR. EDWARDS FIGHT.

O-I simply took the word of Mr. Edwards. O-I did not investigate Mr. Edwards to see what happened inside leading up to the fight, nor did O-I take statements from Mr. Ballard, and Mr. Edwards, as to just where the fight started on or near the approaches to Buckeye Street; but O-I took statements from 3 black women. O-I got Mr. Edwards' story; Why didn't O-I get the blacks' side? Why the difference? The record also shows O-I did not admit in the Grievance proceedings for Mrs. Green, Mrs. Randelman and Ms. Claudia Green, that O-I had no jurisdiction on any fighting taking place on Buckeye Street.

In Ohio, the City of Toledo owns

and controls the "Right of Way" area which extends roughly 12.5 feet or more to each side of the 25 feet or so wide paving. So, clearly here, the fight took place on Buckeye Street.

The O-I Security Guards reported the Green/Randelman fight as being on Buckeye Street, and likewise, the Edwards/Ballard fight. See Affidavit of Alice S. Allen, Ohio Civil Rights Commission, which included a reference to O-I Security Guards. If O-I Security Guards did not claim jurisdiction nor try to stop the Randelman attack on Mrs. Green, why did O-I claim jurisdiction? O-I has never offered any rebuttal to the O-I Security Guard actions.

F. O-I AND UNION DISPARATELY TREATED MRS. GREEN, A UNION COMMITTEE PERSON, IN EXCLUDING HER FROM ALL GRIEVANCE MEETINGS ON HER DISCHARGE, BUT ALLOWED JACK OTTO, A WHITE, SO TO ATTEND.

Mrs. Green was at a disadvantage in trying to defend herself, because she was not allowed inside the plant after being suspended in April, 1974. Mr. Jack Otto, a white, who admittedly struck another white on company property, was allowed to attend all his Grievance meetings. The Union simply did not arrange for Mrs. Green to attend, and left her defenseless, because the Union didn't tell her of what she was accused, the evidence against her, nor did the Union ask Mrs. Green for her answer or explanation about all of the O-I strongest points against Mrs. Green. Mr. Edwards, Local President, and Mr. Bankowski, International Vice-President, didn't know that Mrs. Green had reported her .22 calibre pistol to Mr. Harry Sames, her foreman. Nor did Mr. Edwards tell Mr. Bankowski, nor O-I that O-I, when Mr. Edwards was involved, had admitted O-I had no jurisdiction over any fights on Buckeye Street.

If the Union had brought out the O-I admission of no jurisdiction over Buckeye Street in the Edwards/Ballard fight, and that Mrs. Green had complied with the O-I practices in reporting the .22 calibre pistol to her foreman, and of keeping the bullets separate from the chamber, then O-I could only have charged Mrs. Green with throwing a fingernail-sized pebble at Mrs. Randelman inside a car, which offered no danger to Mrs. Randelman, and this was not an offense meriting discharge.

Mr. Sams, Foreman, has confirmed he knew Mrs. Green had the 22 calibre pistol, and had told her what Mrs. Green claimed. Did O.I. know this, and conceal it. in the Grievance? This in itself fairly presents a jury question. Suppression of favorable evidence for a Black is racial discrimination.

G. IN THE ARBITRATION PROCEEDING FOR THE DAVID McDANIEL, JR. - EDWIN HUNTLEY FIGHT, O-I AGREED TO PROCEED IN THE ARBITRATION ON THE STATEMENTS OF THE WITNESSES, WHICH O-I KNEW WOULD BE FAVORABLE TO ALLOWING THE WHITE, MR. McDANIEL TO BE RE-INSTATED. BECAUSE THE BLACK, MR. HUNTLEY ALREADY HAD A DIFFERENT JOB AND WAS NOT RETURNING TO O-I, WHEREAS IN DISCHARGES OF BLACKS, O-I ALWAYS INSISTED ON LIVE WITNESSES, AS FOR ONE FRANKLIN MOODY, A BLACK.

See Plaintiff's Exhibits 63, Frank Moody Arbitration, and Plaintiff's Exhibit 64 -

H. IN ONLY SUSPENDING FOR THIRTY DAYS LOCAL PRESIDENT EDWARDS FOR BRINGING A PISTOL ONTO THE PREMISES IN NOVEMBER, DECEMBER, 1980, EXACT DATE NOT BEING KNOWN, BUT DISCHARGING OAKLAND RIDLEY, A BLACK, FOR THE SAME OFFENSE, IN APRIL, 1974.

See Mrs. Green's Affidavit, filed February 13, 1981, P. 14, Para. 21, signed also by Mr. Green; and as to Mr. Oakland Ridley, see Plaintiff's Exh. 53.

I. IN NOT CONTESTING THE UNEMPLOYMENT COMPENSATION BENEFITS OF WHITE, BUT CONTESTING THE CLAIMS OF BLACKS, IN DISCHARGES FOR FIGHT- AND RELATED OFFENSES, IN ORDER TO AID AND PREFER THE WHITES, ALTHOUGH THE CLAIMS OF THE DISCHARGED EMPLOYEES WERE SUBSTANTIALLY SIMILAR, AND PARTICULARLY IN CASES INVOLVING FIGHTING.

In Plaintiff's Exhibit 40 on Edwin D. Huntley, are numerous witnesses that Mr. Huntley and Mr. McDaniel were involved in a fight. See statements of Mary Zerbey, Rozina Hess, Mona Barnes, Lois Shirk.

O-I did not submit witness statements, nor vigorously fight the Unemployment claim of Mr. McDaniel, a white, but they vigorously fought Mrs. Green in her Unemployment claim.

J. O-I, IN APPOINTING ONLY FOUR

BLACKS TO HOLD EITHER FOREMAN OR ASSISTANT FOREMAN POSITIONS, OUT OF A TOTAL OF ROUGHLY 204, OR, A PERCENTAGE OF LESS THAN 2%; ALTHOUGH BLACKS HAD A MUCH HIGHER PERCENTAGE OF THE LABOR FORCE, AND OF THE SURROUNDING WORK COMMUNITY.

See Mrs. Green's Affidavit, filed February 13, 1981, Paragraphs 19, 20, 22, 23, 24, (Affidavit signed by Mr. Green also); also, copy of O-I form showing breakdown of employees as to minorities, and positions held; attached to Plaintiff's Motion of October 9, 1980.

K. IN MAKING RACIAL SLURS AGAINST BLACKS.

See Mrs. Green's Affidavit, filed February 13, 1981, Para. 20., where an O-I employee management person called blacks "nigger" and criticized them in terms that sounded prejudiced to Mrs. Green.

L. IN PLACING A DISPROPORTIONATE NUMBER OF BLACKS IN THE LESS DESIRABLE AND LESS PAYING JOBS, LIKE CARTON SEALING, WAREHOUSE AND SHIPPING.

See Mrs. Green's Affidavit, filed 2/13/81, Par. 22, 23.

M. THE UNIONS, FOR MATTERS REFERRED TO ABOVE, AND ALSO FOR REFUSING TO TAKE MRS. GREEN'S CASE TO ARBITRATION, RACIALLY DISCRIMINATED BECAUSE:

1. Mrs. Green had been acquitted of Assault and Battery, in Toledo Municipal Court.

2. Mrs. Green's Case could be won because the attack on her took place on City property - Buckeye Street - therefore O-I did not have jurisdiction.;

3. Mrs. Green had an excellent record, with O-I and the Union;

4. Mrs. Randelman could also have had her job back; on jurisdiction;

5. And both Mrs. Green and Mrs. Randelman could not each be found to be the aggressor.

6. The Union had taken a

white's case to arbitration. Mr. Otto, who admittedly was an aggressor on company property, and Mr. Otto had a bad work record.

As to Mrs. Green's acquittal, see Plaintiff's Ex. 62. As to Mr. Otto, Plaintiff Ex. 65. As to the other points see Mrs. Green's affidavit, filed Feb. 13 1981, App. P. 124.

N. ADDITIONAL EVIDENCE OF UNFAIR REPRESENTATION, AND DISPARATE TREATMENT BY UNION.

During the Union's representation of Mr. Jack Otto, a white, who admittedly was the aggressor, against another white, Attorney Richard M. Colasurd, candidly and properly wrote with copies to Mr. Edwards and others to the International President Parker that, since reportedly Local President Bill Edwards had been involved in a fight, that under his duty of fair representation, that the Local President should disclose and use that evidence. Thus, Union President

Edwards, in not disclosing his fight with Larry Ballard, and O-I's admission that O-I did not have jurisdiction over a fight on Buckeye Street, was deliberately violating his duty of fair representation. The /Union President did not disclose O-I's ruling of no jurisdiction in the Edwards/Ballard fight, either to International Vice-President Bankowski working on Mrs. Green's Grievance, nor to Union Attorney Colasurd.

Plaintiff, by the Affidavit of Mrs. Marie Fitzpatrick, a former Local Steward and Officer active in Grievance and Arbitration, offered expert evidence that both Local 700 and the International would have recommended, and taken, Mrs. Green's grievance to arbitration, and won, if Local 20 had talked to Mrs. Green, told her what was being claimed against Mrs. Green, and learned that Mrs. Green

had had permission from Foreman Sams for carrying the .22 calibre pistol, and had not violated any so-called, but unwritten, O-I rule as to concealed weapons.

The District Court did not pass upon whether the Unions violated their duties of Fair Representation, because of the Statute of Limitations defense.

O. NEITHER MRS. GREEN NOR HER COUNSEL NOR LAWYERS GENERALLY EXPECTED THAT THIS COURT WOULD DECLARE A 180-DAY STATUTE OF LIMITATIONS.

The facts referred to in Questions Presented For Review herein in Question Number 1, are simply born out by the truth and reality.

Not until 1982 did the able counsel for defendants urge the Statute of Limitations as a ground for Summary Judgment.

BASIS FOR FEDERAL JURISDICTION

This topic has been previously discussed at Page 8 herein, "Statement of Jurisdictional Grounds."

A R G U M E N T

I. DEL COSTELLO V. INTERNATIONAL BROTHERHOOD OF TEAMSTERS SHOULD BE APPLIED PROSPECTIVELY IN OHIO; BECAUSE IT DID REPRESENT A CLEARBREAK WITH CASES APPLICABLE TO OHIO LITIGANTS; AND IT'S SIMPLY UNFAIR AND UNJUST TO HAVE EXPECTED MRS. GREEN, AND ANY COUNSEL SHE COULD OBTAIN, TO HAVE KNOWN SHE MUST BRING HER SECTION 301 ACTION IN 180 DAYS.

This was simply not known nor talked about in Toledo, and, we claim, the rest of Ohio.

The able and experienced Attorneys for O.I. and the Unions, if they had known it, would have asserted the defenses long before they did in 1982 - 6 years after the first lawsuit by Mrs. Green.

II. BOTH BENCH AND BAR, AND ABOVE ALL, THE AMERICAN CITIZENS AND PERSONS INVOLVED, NEED DIRECTION FROM THIS COURT AS TO WHAT DOES, AND DOES NOT, CONSTITUTE A PRIMA FACIE CASE UNDER TITLE 42, SECTION 1981, WHICH DEPENDS PRIMARILY ON DISPARATE TREATMENT, WITH SUPPORTING STATISTICAL EVIDENCE.

In McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 49L.ed. 2d. 493 (1976) the facts simply were that two whites were fired, and one black not fired, although each had violated a significant non-waived Company rule against stealing Company property. In 49L.ed2d at page 502, Footnote 11 spelled out the rule that an employer treating differently employees of different races, who are all and each guilty of violations of comparable seriousness, creates an inference of pretextual or discriminatory treatment, which the employer must rebut; and Footnote 11 at page 502 in 49L.2d. reads as follows:

> "11. (9b.) Santa Fe contends that petitioners were required to plead with 'particularity' the degree of similarity between their culpability in the alleged theft and the involvement of the favored co-employee, Jackson. This assertion, apparently not made below, too narrowly con-

stricts the role of the pleadings. Significantly, respondents themselves declined to plead any dissimilarities in the alleged misconduct of Jackson and petitioners, and did not amend their pleadings even after an interim order of the District Court indicated it regared petitioners' allegations of racial discrimination as sufficient to raise the legal problem of dissimilar employment discipline of 'equally guilty' employees of different races. App. 94. Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in McDonnell Douglas, an allegation that other 'employees involved in acts against (the employer) of comparible seriousness . . . were nevertheless retained . . . ' is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext. 411 US, at 804, 36 L Ed 2d 668, 93 S Ct 1817" (emphasis added)"

We respectfully claim that there is need for direction from this great Court.

We respectfully pose the question of whether disparate treatment is not

the most predominant, and, yes, persuasive, evidence of intentional discrimination; and statistics do evidence how the employer treats employees.

In every Section 1981 case, the question intelligently arises: How many such instances does the Plaintiff have to produce? In McDonald, Supra, only one is mentioned.

Yes, every word issued by this Honorable Court is rightly important. But for an issue so important to both many well intentioned, and some not well intentioned, people, isn't America entitled to a full discussion by this Court, in the main body of an Opinion?

Are discriminatory acts occurring after an unlawful discharge, properly admissible on intent? Historically and by precedent the cases are many that hold questions of intent are for the

Jury.

Did O.I. and Union lower echelons know from what in practice their superiors had done, and implicity approved in the past, that the lower echelons could investigate in such fashion that favored whites, and "all would be well"?

If Mr. Sams was fair, and knew Mrs. Green was fired, naturally O.I. would talk with him, and Mr. Sams would do what O.I. had, in practice, told him what they wanted him to do.

Neither O.I. nor the Unions - both the Local through the first 3 steps of the Grievance Procedure, nor the International when Mr. Bankowski, International Vice-President, took over as lead man in the 4th Grievance Procedure step - discussed the Edwards-Ballard fight and O.I. abnegation of Jurisdiction, because Mr. Bankowski only learned of that O.I. ad-

mission of not having Jurisdiction over Buckeye Street, when this Counsel took his deposition, and likewise as to Mrs. Green's explanation, and Mr. Sam's approval.

In a good faith, in a fair, in a non-discriminatory manner, both O.I. and the Unions should have considered and discussed the Ballard-Edwards fight, but that simply wasn't done!

One fairly and objectively cannot say that the actions and decisions under the Grievance Procedure were not racially discriminatory, in result and deed, where these vital, decisive, and important matters were not considered.

The Union investigated and fought one way for whites, and one way for blacks, and so did O.I.

Mrs. Green was thrown out of Court on Summary Judgment.

Mrs. Green and everyAmerican similarly situated direly and sorely needs the direc-

tion that only can come from this Honorable Court.

The able opposing Attorneys did not cite any decisions by this Court defining what does and what does not constitute "actionable disparate treatment", and what is, and is not, admissible.

Relevant from lower courts are:

Windsor v. Bethesda General Hospital, 523 F.2d. 891 (CA 8, 1975).

Williams v. DeKalb, 82 F.R.D., 10, (1979); 577 F.2d. 248; 582 F.2d. 2.

Grigsby v. North Medical Center, Inc., 586 F.2d 457, (1978).

Fong v. American Airlines, Inc., 626 F.2d. 759 (CA 9, 1980).

But again, a decision which will be considered as a clear and binding directive is needed.

III. BENCH AND BAR NEED DIRECTION AS TO THE OBLIGATIONS OF THE MOVING PARTY IN A MOTION FOR SUMMARY JUDGMENT TO OFFER EVIDENCE DISPROVING EACH MATERIAL ALLEGATION OF THE PARTY MOVED AGAINST.

On this basic point, there is no decision from this Court known to this Counsel which is crystal clear on this basic point. In a case from Ohio, Rayburn v. J.C. Penney Outlet Store, 3 Ohio App. 3d 463 (1982) the Court made these clear statements at page 464:

> "In the case of a motion for a directed verdict direct against a plaintiff, he had had a full opportunity to present his evidence, and, if there be an issue upon which there is no evidence, such issue is determined against the plaintiff. Conversely, in the case of a motion for summary judgment directed against the plaintiff, it is incumbent upon the defendant to produce evidence demonstrating that he is entitled to judgment in his favor. If there be a material determinative issue as to which there is no evidence presented by the defendant, then he cannot be entitled to summary judgment since such genuine issue of a material

> fact exists in the case and has not been determined. The obligation of the plaintiff when confronted with a motion for summary judgment filed by the defendant is to present evidence in some form permitted by Civ.R.56(C) controverting the evidence presented by the defendant. There is, however, no affirmative duty upon the plaintiff to present evidence upon material issues as to which defendant has presented no evidence in support of his motion for summary judgment. (Emphasis ours)."

This Counsel knows of no other Federal Case, pro or con, with as clear a holding.

We claim the District Court and Court of Appeals put the burden of proof on us. Should they have so done? We say no.

IV. THE UNION UNFAIRLY REPRESENTED MRS. GREEN

Again, the District Court, and the Court of Appeals, did not reach this issue.

Plaintiff did make a Prima Facie Case. Failure by the Union to know obvious and most important points of defense and offense, and to take the steps to secure relevant evidence on the same, has been held actionable.

Milstead v. International Brotherhood of Teamsters, Local Union No. 957, (CA 6, 1978) 580 F.2d 232; and overall, the Unions did not measure up to their duties, as held in Anchor v. Hines, 424 U.S. 554.

V. EVERY COURT IN DISPOSING OF A CASE, SHOULD STATE THE MAIN CONTENTIONS, FACTUAL AND LEGAL, OF A PARTY, AND DEMONSTRATE THEIR INVALIDITY, BOTH FACTUALLY AND LEGALLY.

Neither the District Court nor the

Court of Appeals on the Racial Discrimination issue, did anything further than state a conclusion. This practice may be invulnerable, but it's not just.

This practice in theory is contrary to the objectives of Rule 52 of the Federal Rules of Civil Procedure.

A Court opinion which does not objectively discuss the main evidentiary claims of Racial Discrimination, falls short of proper judicial standards, and does not discourage Judges from making unjust decisions through error or misconception of some sort. Every Court worth its Salt should fairly meet a litigant's claims and evidences, whether Plaintiff or Defendant, and "Statements of Conclusion", however well intentioned, do lend themselves to unjusterror. The "Appearance of Justice" Doctrine for Courts have relevance here.

CONCLUSION

Important to human dignity is equal treatment. Workers so treated should be motivated to excel their foreign counterparts. Employers and Unions motivated and clearly directed to that goal, can help America and help themselves.

This Counsel now has some "feel" for a worker's chances of winning an Arbitration case. A worker with a good record, with the employer, and the Union, often times, even in the face of a clear rules violation, will be given the job back, if not back pay. So here. Clearly, the Unions should have gone to Arbitration.

In Toledo, and many other industrialized American cities, a discharge "For Cause" from a factory is "Industrial Capital Punishment", and it's practically impossible to get a job.

With O.I. Forman Harry Sams confirming Mrs. Green's statement that she did what he said, and O.I. having abnegated Jurisdiction over fights on Buckeye Street in the Ballard-Edwards fight, an Arbitrator, and indeed O.I., should and would, have, re instated Mrs. Green on her job. She was an accepted and productive worker. When Mrs. Green went to her burglarized home, and was told with police present, by her husband to carry a pistol, she did that to protect her family and herself.

Each Justice living in the Nation's Capitol area must <u>at times</u> be concerned about his or her safety, and the safety of dear ones.

What may an American do to preserve her family?

How would an Arbitrator fairly rule when facing facts as Mrs. Green and her Counsel have demonstrated may be brought forward.

If Summary Judgment is used to deny deserving litigants, Americans will not have the respect for our Court System which as a Democracy we need. We merit equal treatment.

On the walls of this Great and Honorable building, when this writer last saw it, as recalled, were the words, "Equal Justice Under the Law."

That is what we seek; nothing more; nothing less; and so does America. But our Great Nation needs your help.

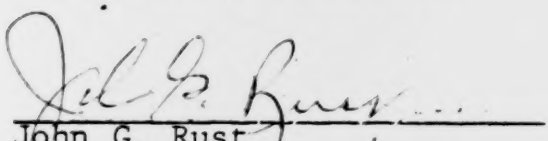
This writer has the ability, courage, determination, and motivation, to present to you, a case worthy of your best traditions, with the requisite research, provocative and significant questions, and a

respectful commitment to excellence. This Counsel in his last year at the Law School of the University of Virginia, was, for that year, in the top 15% scholastically; and was able to "Hold his own" in the Colloquy with the Professors and the able students from the South and East, including Franklin D. Roosevelt, Jr., and the "Hahvud" men.

An injustice so far has been done.

Mrs. Green, her family, and her Counsel respectfully request this Honorable Court ot issue a Writ of Certiorari to the Sixth Circuit.

Respectfully submitted,



John G. Rust,
Attorney for Petitioner
Christine Green

A P P E N D I X

NOT FOR PUBLICATION

No. 84-3131

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTINE GREEN,

Plaintiff-Appellant,

-vs-

OWENS-ILLINOIS CO.; AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, AFL-CIO, LOCAL &)); AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, AFL-CIO

Defendants-Appellees,

Filed October 17, 1985
John P. Hehman, Clerk

On the Appeal from the United States District Court for the Northern District of Ohio.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

Before: ENGEL and KEITH, Circuit Judges; and WISEMAN, * District Judge.

PER CURIAM. Petitioner Christine Green appeals the decision of the United States

District Court for the Northern District of Ohio granting the motion for summary judgment filed by defendants Owens-Illinois, Co., American Flint Glass Workers Union, AFL-CIO Local 700, and American Glass Workers AFL-CIO (International), on her claims of discriminatory discharge under 42 U.S.C. Sec. 1981, 1985, and on her claims under section 301 of the Lobor Management Relations Act (LMRA), 29 U.S.C. Sec. 185 (a) for breach of the collective bargaining agreement and breach of the duty of fair representation.

On July 6, 1970, Green obtained employment with Owens, eventually reaching the position of shop committee person. She was discharged along with her daughter, Claudia, and Paulette Randleman for "instigating a disturbance, fighting, and bearing weapons on company property at approximately 7:00 a.m., Sunday, April 21, 1974." On April 26, the Union initiated proceedings under a four-step grievance process. During the proceedings, Green's daughter's discharge was reduced to a

disciplinary suspension. On May 31, 1974, the International decided not to pursue Green's grievance to the fourth stage -- arbitration. After filing unsuccessful claims with the Ohio Board of Employment Services, the Ohio Civil Rights Commission and the Lucas County Court of Common Pleas, Green initiated the instant action on October 25, 1977.

The district court found the facts uncontroverted and held that Green's discharge was for just cause. It further held Green's section 301 claims to be barred by the ninety day Ohio statute of limitations for claims pertaining to the vacation of arbitration awards. The court refused to retroactively apply the Supreme Court's decision in DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (1983), which provided for a six-month federal statute of limitations in section 301 actions.

The court has ruled that DelCostello is to be applied retroactively, Smith v. General Motors Corp., 747 F. 2d 372 (6th Cir. 1984). Petitioner's section 301 claim, therefore, remains barred since the six-mont limitation had run before she commenced her action.

With respect to petitioner's claim unde 42 U.S.C. Sec. 1981, the court concludes that the district court was clearly correct and that the grant of summary judgment there was not error. The affidavits and other evi dence submitted fully satisfy the court that plaintiff could submit no set of facts entitling her to prevail were the case to go to trial on her claims under sections 1981 and 1985. In this respect the district judge properly concluded that the uncontroverted facts in the case conclusively indicated that the plaintiff's discharge was for cause and was wholly unconnected with any

claim of pretext masking a discriminatory intent.

Accordingly, the judgment of the district court is AFFIRMED.

No. 84-3131

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTINE GREEN,	*	Filed January 2, 1986
Plaintiff-Appellant	*	JOHN P. HEHMAN, Clerk
v.	*	
Owens-Illinois Co., Et al.,	*	ORDER
Defendants-Appellees	*	
	*	

BEFORE: ENGEL and KEITH, Circuit Judges, and WISEMAN* Chief United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

*Hon. Thomas A. Wiseman sitting by designation from the Middle District of Tennessee

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 77-550

Christine Green,

-vs-

Owens-Illinois Co., et al.,

Filed 1984 Jan-5 AM 10:16 CLERK U.S. DISTRICT COURT NORTHERN DISTRICT TOLEDO, OHIO

JUDGMENT

Decision by Court. This action came to hearing before the Court with the judge (magistrate) named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Summary judgment granted in favor of defendants. Case dismissed with prejudice.

Nicholas J. Walinski
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION
No. C 77-550

CHRISTINE GREEN,) Filed 1984 Jan-5
AM 10:16 CLERK U.S.
Plaintiff,) DISTRICT COURT NOR-
THERN DISTRICT
-vs-) TOLEDO, OHIO

OWENS-ILLINOIS CO.,) OPINION AND ORDER
et al.,
)
Defendant,
)

* * * * *

WALINSKI, J.

This cause is before the Court on defendants, Owens-Illinois, Inc.'s (hereinafter O.I.), the American Flint Glass workers Union, AFL-CIO Local 700's (hereinafter Union) and American Flint Glass Workers AFL-CIO's (hereinafter Int'l) motions for summary judgment and plaintiff's opposition thereto.

The motions were renewed and supplemented after an amended complaint was filed. The plaintiff has maintained her opposition.

Procedurally, the matters presented to the Court are opposed motions for summary

judgment, opposed supplemental motions for summary judgment as the result of a recent decision of the U.S. Supreme Court, and renewed motions for summary judgment following the filing of an amended complaint.

Rule 56, Fed. R. Civ. P. directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law...

In ruling on a motion for summary judgment, the Court's function is to determine if any genuine issue exists, not to resolve any factual issues, and to deny summary judgment if such an issue exists. United States v. Diebold, Inc., 369 U.S. 654 (1962); Tee-Pak, Inc. v. St. Regis Paper Co. 491 F.2d 1193 (6th Cir. 1974). Further,

"(i)n ruling on a motion for summary judgment, the Court must construe the evidence in its most favorable light for the party opposing the motion and against the movant." Bohn Aluminum & Brass Corp. v Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962). To summarize, if the movant demonstrates that he is entitled to a judgment as a matter of law, then the Court must next weigh the evidence in a light most favorable for the party opposing the motion; if reasonable minds could differ as to a material fact in issue, then a genuine factual dispute exists and the motion for summary judgment must be denied.

Rule 56 (e) places a responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question

of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P.

The motions sub judice are supplemented by affidavits, grievance records, the pertinent provisions collective bargaining agreement, the plant rules, and statements of twenty (20) witnesses to the incident herein, plus other documentation.

The Court finds that there are not genuine material issues of fact, and that

this cause is now decisional.

FINDINGS OF FACT

Plaintiff brings this action pursuant to 42 U.S.C. §1981, §1985 and Section 301 of the Labor Management Relations Act (LMRA) 29 U.S.C. §185 (a) et seq.

The plaintiff, a black female, was hired by the defendant O.I. on July 6, 1970. She rose to the position of shop committee woman. Plaintiff was discharged by the defendant O.I. for "instigating a disturbance, fighting, and bearing weapons on Company property at approximately 7:00 a.m., Sunday, April 21, 1974."

The fith began on a driveway leading into the Toledo Libbey Glass plant of defendant O.I. at the Buckeye Street entrance. The fight carried over into Buckeye Street, and finally concluded in the Company parking lot across Buckeye

Street. Plaintiff and one Paulette Randleman were involved. Throughout the altercation Ms. Randleman was armed with a knife, and plaintiff brandished a pistol. Plaintiff admitted having the pistol in her possession inside the plant "for protection". Both Ms. Randleman and plaintiff were discharged.

With the help of the Union, plaintiff filed a grievance under a four step grievance procedure, the final step being arbitration. The Int'l decline submission to arbitration after reviewing the evidence gathered at earlier stages of the grievance procedure.

Plaintiff filed for unemployment benefits with the Ohio Bureau of Employment Services (OBES), but the Board of Review of OBES found her discharge to have been for just cause and denied benefits. The Lucas County Common Pleas Court (Ohio)

affirmed the denial of benefits. The Sixth District Court of Appeals (Ohio) affirmed.

Plaintiff filed a discrimination complaint with the Ohio Civil Rights Commission (OCRC) which found no basis for probable cause. This matter is now under reconsideration. An Appeal to Lucas County Common Pleas Court (Ohio) was dismissed for want of jurisdiction.

Plaintiff then filed a complaint with the Lucas County Common Pleas Court charging O.I. with a breach of the Collective Bargaining Agreement. That court dismissed the complaint, and the Court of Appeals affirmed. The instant lawsuit ensued.

Article 36, Section 1 of the Collective Bargaining Agreement provides in part "No employee shall be discharged without just cause."

The plant rules provide for disciplinary action, including layoff and termination for their violation. Rule 1 requires compliance with all laws concerning health and safety. Rule 3 prohibits fighting on Company property.

The Court need not resolve the factual disputes as to the locations of the onset of the fight since both plaintiff and Ms. Randleman admit the altercation began on the Company's entrance driveway.

With respect to plaintiff's § 1981 and §1985 claims, the Court finds that even if plaintiff could make a prima facie showing of discrimination, the uncontroverted facts indicate that plaintiff's discharge was not the result of a pretext, but was, in fact, for just cause. Furthermore, the Court finds no evidence on the record to rebut this conclusion.

The Section 301 Claim

In the present case plaintiff's claims under Section 301 of the National Labor Relations Act are barred by the statute of limitations.

Fifteen years ago in International Union UAW v. Hoosier Cardinal Corp., 333 U.S. 696 (1966) the United States Supreme Court held that the timeliness of a Section 301 suit is to be determined by reference to the appropriate state statute of limitations. In United Parcel Service v. Mitchell, 451 U.S. 56 (1981) the Court held that in a Section 301 suit against both the employer and union, the most appropriate state statute of limitations with respect to the action against the employer was the limitations period for the vacation of arbitration awards. The Mitchell decision left open the question of what state statute should govern against the union.

In Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982) the Court was faced with a hybrid Section 301 action against both the employer, for breach of the collective bargaining agreement and the union for breach of its duty of fair representation, such as that presented in the case sub judice. Under these circumstances the Sixth Circuit held that the rule of Mitchell applies and that the "state statute of limitations prertaining to the vacation of arbitration awards will be utilized in subsequent federal court proceedings." 679 F.2d at 98.

In Lawson v. Teamsters Local 100, 112 LRRM 2555 (6th Cir. 1983) the Sixth Circut reaffirmed and clarified its decision in Badon. There, again faced with a hybrid Section 301 suit against both the union and employer, the Court held that the Mitchell decision mandates the application of Ohio's ninety (90) day statute

of limitations governing vacation of arbitration awards.

The Lawson Court also found that the Mitchell decision should be applied retroactively to pending actions against employers and unions. 112 LRRM at 2555.

On June 8, 1983 the United States Supreme Court in Del Costello v. International Brotherhood of Teamster, ___U.S.___ 51 USLW 4693 (1983) and the companion cases of United Steelworkers of America v. Flowers, Id. held that the appropriate statute of limitations in suits against the employer and a union alleging the employers breach of a collective bargaining agreement and the unions breach of its duty of representation is the six month period established for filing charges of unfair labor practices under §10(b) of the National Labor Relations Act. 29 U.S.C. §160(b).

For the reasons stated below the Court will not apply the rule of Del Costello retrospectively to this case.

As a general rule a recent authoritative opinion interpreting the law should be applied to pending cases unless it represents a "clean break" with the past and unless in addition it would be fundamentally unfair or otherwise burdensome to so apply it. Lawson v. Teamsters Local 100, 112 LRRM 2555 (6th Cir. 1983). See Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); United States v. Johnson, 102 S.Ct. 2579 n.12.2595 (1982).

As observed in Lawson v. Teamsters Local 100, supra, the Supreme Court in Mitchell was merely clarifying the rule of International Union UAW v. Hoosier Cardinal Corp., supra, established fifteen years earlier. The Mitchell Court determined which state statute should be

applied in a Section 301 suit. For this reason the Lawson Court concluded that Mitchell does not "represent the kind of 'clean break' with past precedent contemplated in Chevron and Johnson" and therefore should be applied retroactively. 112 LRRM at 2555.

In Del Castello, however, the Court held that a federal statute of limitations should be applied to Section 301 actions. This completely changes the precedent established fifteen years earlier in Hoosier Cardinal, supra. Del Castello therefore creates new law and represents the "clean break with past precedent." See Pitts v. Frito-Lay, Inc., 700 F.2d 330, 333, n.3 (1983). Therefore this Court will not give Del Castello retroactive application to the present case.

Accordingly, the Court finds that the appropriate statute of limitations

in this action is that mandated by Lawson, namely, Ohio Rev. Code §2791.13 (1976). That statute mandates a ninety (90) day limitations priod for the vacation of arbitration awards.

CONCLUSIONS OF LAW

1. From the uncontroverted facts, defendant, O.I. had just cause to discharge the assailants.

2. Under the authority of United Parcel Service v. Mitchell, supra, and Lawson v. Teamsters Local 100, supra, the Court finds the Section 301 LMRA cause is time barred.

Accordingly, summary judgment is granted in favor of the defendants and this is cause is dismissed with prejudice.

IT IS SO ORDERED.

Nicholas J. Walinski
UNITED STATES DISTRICT JUDGE

I hereby certifty that this instrument is a true and correct copy of the original on file in my office.
ATTEST: James S. Gallas, Clerk
U.S. District Court
Northern Dist. of Ohio

BY: Vicki L. Lorenzen
Deputy Clerk
Toledo, Ohio

Title 42, Section 1981:

"§1981. Equal rights under the law

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kinds, and to no other. (R.S. § 1977.)"

Title 29, Paragraph 185:

"§ 185. Suits by and against labor organizations

"(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Responsibility for acts of agent--Entity for purposes of suit--Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) Service of process. The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. (June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)"